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## The Treaty-Making Process under the 1988 Federal Constitution of Brazil - Latin America

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# THE TREATY-MAKING PROCESS UNDER THE 1988 FEDERAL CONSTITUTION OF BRAZIL

GUIDO F.S. SOARES\*

## I. INTRODUCTION

The National Constituent Assembly adopted the present Federal Constitution of Brazil. The Assembly formed itself out of the National Congress into the supreme body of the nation. In fact, the National Congress stopped functioning as a legislative body, and dedicated itself for nearly a year to the writing of the Brazilian Federal Constitution. The President of the National Constituent Assembly solemnly promulgated the 1988 Federal Constitution in Brasilia on October 5, 1988.

Unlike many other Federal Constitutions of Brazil, the 1988 Constitution was prepared, debated, and adopted without the preparation of a bill from the Executive Branch of the Government. Instead, it resulted from the legislative activities of the commissions and subcommissions of the National Constituent Assembly. According to Professor Manoel Gonçalves Ferreira Filho, it is natural that its text

repeated itself, and is contradictory. It is evident that in twenty-four subcommissions, and through eight commissions, one could not avoid that different views would prevail on similar or related points, because of existing ideological divisions. Furthermore, the subcommissions and commissions went far beyond their powers, invading the spheres of others, trying to promote their own views.<sup>1</sup>

The final version of the 1988 Federal Constitution of Brazil is a very complex document, full of self-executing dispositions and a large number of programmatic dispositions. In the constitutionalists' eyes, it exhibits an enormous lack of good legal technique.

In this analysis of the 1988 Federal Constitution, we are going to use the English version, which was prepared by the Legislation Committee of the American Chamber of Commerce for Brazil-São Paulo, in cooperation with the Association Alumni of São Paulo. Also, in this paper, we

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1. MANOEL GONÇALVES FERREIRA FILHO, 1 COMENTÁRIOS À CONSTITUIÇÃO BRASILEIRA DE 1988 2 (1990).

will translate into English texts originally written in Portuguese. Texts written originally in English shall be so indicated.

This paper will not consider the Vienna Convention on the Law of Treaties, despite the great importance it is given in Brazil, because it has not yet been ratified by Brazil. Brazil signed and ratified the Havana Convention on Treaties of 1928, but scholars, judges and legislators ignored it.

## II. FOREIGN AFFAIRS AND THE BRAZILIAN FEDERATION

With respect to foreign affairs, the 1988 Federal Constitution presents some difference from previous constitutions. For example, some articles, sections and subsections have been removed, while others have been added. These changes are not always clear, nor are they necessarily tied to a change in policy. One change in policy in constitutional matters is reflected in article 4:

Article 4 - The international relations of the Federative Republic of Brazil are governed by the following principles:

- I. national independence;
- II. prevalence of human rights;
- III. self-determination of peoples;
- IV. non-intervention;
- V. equality among States;
- VI. defense of peace;
- VII. pacific solution of conflicts;<sup>2</sup>
- VIII. repudiation of terrorism and racism;
- IX. cooperation among peoples for the progress of mankind;
- X. granting of political asylum.

Sole paragraph - The Federative Republic of Brazil shall seek economic, political, social, and cultural integration of the peoples of Latin America, in order to form a Latin-American community of nations.

Another change in the general policy for foreign affairs is related to the participation of the Brazilian Congress in the treaty-making process. Article 49-I, intended to manifest control by the legislative branch of the government in the treaty-making process, is awkwardly constructed. Professors Celso Bastos and Ives Gandra Martins have noticed an important omission in the 1988 Federal Constitution: the omission of the place of International Law as a source for internal law (a choice between monism or dualism). They have regretted that the 1988 Constitution had lost

2. The latter 1969 Constitution stated, "[i]nternational conflicts shall be settled through direct negotiations, arbitration and other peaceful means, with the cooperation of international organizations in which Brazil participates."

the occasion "to open a door to legal internationalism."<sup>3</sup>

One relevant section of the 1988 Constitution is Title III, the Organization of the State. Chapter II of that section describes the federal units of Brazil: the Republic, the States, the Municipalities, and the Federal District. Article 21 describes the jurisdiction and the power of the Republic:

Article 21 - It is incumbent upon the Republic:

- I. to maintain relations with foreign States and participate in international organizations;
- II. to declare war and make peace;
- III. to warrant national defense;
- IV. to allow, in the events set forth in a supplemental law, foreign forces to cross the nation's territory or remain in it temporarily;
- V. to decree state of siege, state of defense and federal intervention.

In addition to article 84-VIII (the President's powers in the treaty-making process), and article 49-I (Congress' exclusive power to approve treaties), this study will analyze other provisions of the 1988 Constitution relevant to international agreements:

a. Article 5, paragraph 2: The rights and guarantees established in this Constitution do not preclude others arising out of the regime and principles adopted by it, or out of *international treaties* to which the Federative Republic of Brazil is a party.

b. Article 102: The Federal Supreme Court shall be responsible, mainly, for safeguarding the Constitution and it is incumbent upon it:

III. to adjudicate, at extraordinary appeal level <sup>4</sup> cases decided in a sole or last instance, when the appealed decision:

b. declares the unconstitutionality of a *treaty* or a federal law.

c. Article 105: It is incumbent upon the Superior Court of Justice:

III. to adjudicate, at special level, cases decided, in a sole or last instance, by the Federal Regional Court or by the Courts of the States, of the Federal District and Territories, when the appealed decision:

a. is contrary to a *treaty* or federal law or denies the effectiveness thereof.

d. Article 109: It is incumbent upon the federal judges to process and adjudicate:

III. cases based on a *treaty* or a contract of the Republic with a foreign State or international organization.

e. Article 109: It is incumbent upon the federal judges to process and adjudicate:

V. crimes set forth in *international treaties or conventions*, when,

3. CELSO BASTOS & IVES GRANDRA MARTINS, 1 COMENTÁRIOS À CONSTITUIÇÃO DO BRASIL 452 (1988) (promulgada a 5 de outubro de 1988).

4. This appeal is a judicial review measure similar to certiorari in the United States.

prosecuting having commenced in Brazil, the result has taken place or should have taken place abroad, or reciprocally.

- f. Article 178, paragraph 1: The organization of international transportation shall comply with the *agreements* signed by the Republic with due regard for the principle of reciprocity. [emphasis added]

The variety of denominations for international treaties is evident. This lack of uniformity is still more striking when the treaty-making process is analyzed.

Unlike the USA, in Brazil there is a clear division of the matters that fall within the jurisdiction of the Republic, and those which fall within the jurisdiction of the States. This division is express in the Constitution:

Article 25, paragraph 1: To the States is reserved jurisdiction over the matters not forbidden to them by this Constitution.

Brazil differs from the U.S. in this regard because, unlike the U.S., the Brazilian Federation emerged from a unitarian State (the Empire of Brazil), and split into decentralized federal units. The essence of the federation, then, was a partition of a single unit. In the U.S., in contrast, the sovereign states gave away parts of their jurisdiction in order to constitute a union of the States.

There is a twilight zone between international contracts and international treaties, where the Brazilian States and the Municipalities can exercise a power not expressly forbidden by the Constitution. For example, the States and Municipalities can negotiate contracts with foreign entities, such as foreign states, international organizations, or private banks. Because they are not treaties, and because their nature under the Constitution has not been challenged, these contracts do not fall within the categories of the treaty-making process. However, the Constitution has a special provision about this phenomenon:

Article 53: It is incumbent exclusively upon the Senate:

- V. to authorize foreign transactions of a financial nature, of interest to the Republic, the States, the Federal District, the Territories, and the Municipalities.

Even when the States of Brazil have a strong interest in foreign relations with bordering countries, the entire relationship is conducted by the government of the Republic. Such simple matters as transfrontier movements fall under federal jurisdiction. Four large international zones are affected by this doctrine: the area of Amazon Cooperation Treaty; the area of the Lagoa Mirim Treaty (Brazil-Uruguay); the area of the Plate Basin Treaty (Brazil, Uruguay, Paraguay, and Argentina); and the area of the Itaipu Treaty (Brazil-Paraguay). Under the 1988 Constitution, the States, Municipalities, Federal Territories, and Federal District do not

have the international personality to enter into relationships with foreign countries.

### III. FOREIGN AFFAIRS AND NATIONAL CONGRESS: AN OUTLINE

There are two special provisions in the 1988 Constitution related to the treaty-making process:

Article 84: It is incumbent exclusively upon the President of the Republic:

VII. to maintain relations with foreign States and to accredit diplomatic representatives;

VIII. to enter into international treaties, conventions and acts, according to the referendum of Congress.

Article 49: It is incumbent exclusively upon Congress:

I. to resolve conclusively on international acts, agreements or treaties which involve charges or commitments against the national patrimony;

II. to authorize the President of the Republic to declare war, to make peace, to allow foreign forces to go through the national territory or to remain therein temporarily, except for the cases set forth in a supplemental law.

The President of the Republic is exclusively responsible for a number of activities, and the treaty-making process is just one of the activities within the President's domain. There are, however, no clear definitions of what activities by the President are contemplated. Commentators on previous Constitutions often questioned which of the President's acts related to foreign affairs must be approved by Congress: whether bilateral or multilateral acts, or even unilateral acts that are directly related to foreign affairs. In the case of bilateral or multilateral acts, the debates deal with the constitutionality of international executive agreements. In the case of unilateral acts, the debates surround acts such as termination, denunciation, or reformation of existing international treaties which had already been approved by congressional referendum.

Under Article 84 of the 1988 Brazilian Federal Constitution, the treaty-making process is fully entrusted to the Federal Government. In the Presidentialist form of government, the Federal Government is represented in foreign and domestic affairs by the President. Thus, no other branch of government may negotiate international agreements either with foreign states or with international organizations. The President has sole authority to engage the Federative Republic of Brazil in international relations. The President's authority arises not from the international practice related to federal power within federal systems, but exclusively from the express text of the Constitution. Thus, if foreign

tribunals recognize international personality for some of the States, or even for some of the Municipalities,<sup>5</sup> such decisions would have no effect on the internal constitutional definitions in Brazil, and would have even less effect on judicial decisions internally.

The President's power related to the treaty-making process, then, is conditioned on Congress's approval. This constitutional rule was inspired by the U.S. Constitution, which served as a model for the first 1891 Republican Constitution of Brazil. The 1824 Constitution of the Brazilian Empire (which created a unitarian government with a parliamentary regime) obliged the Emperor to submit to Parliament only those treaties which involved a real change in the territory of the country as a consequence of their application. Together with the Proclamation of the Republic in 1889, Brazil has imported the U.S. model not only for its Republic, but also for U.S. presidentialism, and for more complete control by the Congress in the treaty-making process. However, the treaty-making process has one major modification in Brazil: Congress's approval was not entrusted solely to the Senate, but to both Houses of the Legislative Branch of Government. Thus, international agreements are approved by the House of Representatives as well as the Senate, in separate sessions.

Nevertheless, the Senate has kept a certain precedence in relation to the House of Representatives in matters of foreign affairs. The Senate authorizes foreign transactions of a financial nature relating to the Republic, the States, the Federal District, the Territories, and the Municipalities.<sup>6</sup> Further, it is exclusively incumbent upon the Senate:

- a) to give its prior approval, by secret ballot, after closed hearing, on the selection of the leaders of diplomatic missions (Article 52-IV) ;
- b) to provide for the aggregate limits and conditions for foreign and domestic credit transactions of the Republic, the States, the Federal District and the Municipalities, of their autonomous government entities and other entities controlled by the Federal Government (Article 52-VII);
- c) To provide for the limits and conditions for the Republic to render its guarantee in foreign and domestic credit transactions (Article 52-VIII).

5. In terms of recognition of immunities to jurisdiction of certain States of the Brazilian Federation, there are some decisions of foreign tribunals which have given them certain qualities that in the Brazilian law only the Republic should have. See GUIDO F.S. SOARES, *DAS IMUNIDADES DE JURISDIÇÃO E DE EXECUÇÃO* (1982).

6. See Article 52-V.

#### IV. THE PROCEDURE OF NATIONAL CONGRESSIONAL APPROVAL

The procedure for congressional approval for a treaty is similar to the procedure for approval of federal statutory law. Once the President concludes negotiation of the treaty, the text of the treaty is sent to the House of Representatives in the form of an Executive Message. After the House of Representatives approves the treaty, the text is sent to the Senate. If the House of Representatives fails to approve the treaty, the legislative process is ended, and there is nothing to be sent on to the Senate. Approval by the Senate takes the form of a Legislative Decree, which is issued by the President of the Senate, and is published in the *Diário Oficial do Congresso Nacional*, the official publication for Congress's formal acts.

Legislative Decrees are considered to be the final evidence of the National Congress's will during the treaty-making process. Any reservations or interpretations of approved treaties used to appear on the Legislative Decrees. The quorum required for adoption of a treaty is required for approval of simple statutes: an absolute majority of the total members of the Representatives and Senators, with a positive vote of the absolute majority of the members present at the session.

According to Professor A.F. Rezek, Justice and former Minister of Foreign Affairs of Brazil:

The use of the Legislative Decree as a device for Congress's approval of treaties represents a more adequate technique than that of a formal statutory law at present in use in France and used in former times in Brazil. It makes no sense that this kind of an act of approval, which reflects the Congress's position with absolute purity, should be subject to the sanction of the President of the Republic, and consequently, it could give occasion to an unusual possibility of a veto.<sup>7</sup>

According to a highly respected Brazilian scholar, Pontes de Miranda:

Legislative decrees are the statutory laws which the Constitution doesn't require their sending back to the President of the Republic for sanction (promulgation and veto) (Commentários à Constituição de 67, III, pg. 139).<sup>8</sup>

Unlike other countries, in Brazil there is no need for a special statutory law to bring an international treaty into force. Nonetheless, it is customary to put these congressionally approved treaties into effect by way of a President's Decree of Promulgation. International agreements

7. JOSÉ FRANCISCO REZEK, DIREITO DOS TRATADOS 332 (1984).

8. MANOEL GONÇALVES FERREIRA FILHO, 2 COMENTÁRIOS À CONSTITUIÇÃO FEDERAL, EMENDA CONSTITUCIONAL NR.1 DE 17 DE OUTUBRO DE 1969 15 (1974).



which do not require congressional approval (such as Executive Agreements), and those which do not require a second manifestation of the President (such as the International Labour Organization Conventions) enter into force by mere publication, without the need for a President's Decree of Promulgation. According to Professor Rezek:

. . . the Decree of Promulgation does not constitute a constitutional requirement. It is the product of a practice as ancient as the Independence and the first treaty-making exercises of the Empire. It is just a decree only because the Head of State's acts must bear such name. It means an act of publicity of the treaty existence, and it is a rule of present and imminent force. The organ of the official press publishes them in order for the treaty—of which the complete text follows therewith—to be able to produce their effects at the appropriate moment.<sup>9</sup>

It is important to note that even in the two critical moments of recent Brazilian history, when the National Congress had been abusively removed from national life,<sup>10</sup> treaties were approved by a simple decree of the President or by a "statutory decree". Again according to Professor Rezek:

in all those cases, a curious procedure of determination of the national will was followed: the Executive power negotiated and signed the agreement, then proceeded to its analysis and, if he wished to go further, a decree or a statutory decree was issued to approve it . . . then having been supplied with his own approval, he ratified the treaty.<sup>11</sup>

In former Brazilian Constitutions, there was a perfect correspondence, in both words and concepts, between the President's power to

9. REZEK, *supra* note 7, at 385-86.

10. Twice in Brazilian constitutional history, statutory decrees (*decretos-leis*) have existed. The first occasion was during the *Estado Novo*, a time of dictatorship, when President Getulio Vargas closed the National Congress, from November 10, 1937 to February 2, 1946 (when the Constituent Assembly was installed). During this period, the President issued statutory decrees on matters where the participation of the National Congress would normally have been necessary, because there was no National Congress. The second occasion was during the turbulent period which followed the 1964 revolution, with Institutional Acts 2 and 4. Because there was not a Federal Constitution approved by the people in effect during this period, the President was authorized to issue statutory decrees on matters of national security and public expenditures. This was during the so-called "extraordinary convocation" of the Congress, from December 12, 1966 to January 24, 1967. These exceptional periods are reflected in the constitutional dispositions in 1967 (Art.58) and in 1969 (the Federal Constitution of 1969, Art.55):

Art.55 - In urgent and relevant cases, and unless there is no increase in expenditure, the President of the Republic may issue statutory decrees on the following matters:

I- national security;

II- public finance, including tax law;

III- creation of public offices and their compensation.

Paragraph 1.- The text of the statutory decree shall enter immediately into force, The National Congress shall approve it or reject it, within 60 days, and it shall not be amended. If within this period there is no deliberation, the text shall be considered as approved.

Paragraph 2.- The rejection of a statutory decree shall not cause the nullity of the acts which were done while it had been in force.

11. REZEK, *supra* note 7, at 332.

enter into international treaties and the Congress's power to approve them. In the new 1988 Federal Constitution, there are important differences between the President's power and Congress's power. Contrast Article 84-VIII:

[I]t is incumbent exclusively upon the President of the Republic . . . to enter into international treaties, conventions and acts, ad referendum of Congress.

with Article 49-I:

[I]t is incumbent exclusively upon Congress . . . to resolve conclusively on international acts, agreements or treaties *which involve charges or commitments against the national patrimony* (emphasis added to the change introduced in the 1988 Federal Constitution).

The introduction of these new qualifications on Article 49-I must be read according to a broad and historical sense.

Brazilian scholars who interpreted previous Brazilian Constitutions considered the use of synonymous words for "treaty" to be evidence of the framers' intent that any type of international commitments (regardless of the formal denominations such as treaty, convention, agreement, protocol, etc.), be submitted to Congress for approval. The late professor Afonso Arinos and other professors of constitutional law asserted that the existence of a list of synonymous words represented the constitutional legislator's intent that the words "treaties, conventions, and acts" be read to include any form of international commitment. They argued that the synonyms were used to avoid the argument that only international commitments expressly denominated "treaties" should be sent to Congress for approval. However, Professor Arinos pointed out that the problem had not been solved, because congressional approval could still be circumvented by using still another synonym that is not on the list, under some interpretations of the clause.

The same argument can be used in regard to the new language of Article 49-I. The inclusion of the expression "which involve charges or commitments against the national patrimony" side by side with "international acts, agreements, or treaties" can be read in two ways—either as a limitation of the President's power in treaty-making, or a limitation of Congress's power in treaty-making. Furthermore, one could read that only treaties (under any denomination) which involve charges or commitments against the national patrimony should be sent to Congress for approval!

## V. EXECUTIVE AGREEMENTS AND THE BRAZILIAN PRACTICE

The question of qualifications of the international commitments in-

volved in the treaty-making process represents an important issue, especially when examining the validity of Executive Agreements under the Brazilian Constitution. This issue has been discussed with a certain passion by scholars, but up to this moment, the National Congress has not directly challenged the President's activities in this area, nor has there been a direct judicial decision on the matter.<sup>12</sup>

As far as executive agreements are concerned, opinions are divided in Brazil. Some important scholars<sup>13</sup> argue that executive agreements are unconstitutional because they are international commitments which the President has not sent to Congress for approval. If, in fact, there are no international acts exempt from Congress's approval, and the framers' intent was not to create any exempt acts as evidenced by the list of synonyms, then the President has no reason not to send an international agreement to Congress. After all, the intent of the Constitution is to impose a heavy obligation on the President to work closely with Congress. And finally, the words of a statute are not useless, particularly when that statute is the Federal Constitution. If such words were used with a special meaning intended, they must be given that meaning. This was the opinion of Professor Haroldo Valladão.

While the 1988 Constitution was being written, a book was published which gathered together the suggestions of professors of international law for the future Federal Constitution.<sup>14</sup> One article<sup>15</sup> in the book summarized the opinions of Ambassador Hildebrado Accioly, Consultant of the Ministry of Foreign Affairs of Brazil, and one of the best supporters of the constitutionality and legitimacy of executive agreements. The following is a translation of Professor Mello's summary of Ambassador Accioly's opinions:

The group that has admitted the conclusion of executive agreements

12. I have personally been interested in this subject and have written an entry on Agreements, Executive Agreements, and Gentlemen's Agreements in 5 ENCICLOPEDIA SARAIVA DO DIREITO 246-81 (1977). This entry was later republished in 73 REVISTA DE FACULDADE DE DIREITO DA UNIVERSIDADE DE SÃO PAULO 283-331 (1977) and in 272 REVISTA FORENSE 57-76 (1980), both with the title *Acordos Administrativos e Sua Validade no Direito Brasileiro*.

13. See, e.g., Afonso Arinos de Mello Franco, *Poder Legislativo e Política Internacional* in ESTUDOS DE DIREITO CONSTITUCIONAL, REVISTA FORENSE (Rio de Janeiro ed., 1957), and especially the synthesis provided by Prof. Haroldo Valladão in *Aprovação de Ajustes Internacionais pelo Congresso Nacional Parecer* in BOLETIM DA SOCIEDADE BRASILEIRA DE DIREITO INTERNACIONAL (1950), and *Parecer* in BOLETIM DA SOCIEDADE BRASILEIRA DE DIREITO INTERNACIONAL 5-11 (1948).

14. The book was published under the coordination of Professor Jacob Dollinger. A NOVA CONSTITUIÇÃO E O DIREITO INTERNACIONAL: PROPOSTAS E SUGESTÕES (Jacob Dollinger ed., 1987).

15. Celso de Albuquerque Mello, *Constituição e Relações Internacionais* in A NOVA CONSTITUIÇÃO, *supra* note 14.

within the framework of the Constitution was headed by Hildebrando Accioly. One can say that those who have defended such an idea have been influenced by the American practice. We're going to make a summary of this great internationalist's arguments. He has stated that the Congress's approval would be dispensed with for the following acts:

- a) agreements about matters which fall within the exclusive jurisdiction of the Executive power;
- b) those concluded by agents or officers who have jurisdiction thereon, about questions of local interest or of limited importance;
- c) those which deal with simple interpretation of the clauses of a treaty already in force;
- d) those which are the logical or necessary consequences of some treaty in force and which are complementary to it;
- e) those *modus vivendi* when they aim at only leaving "things in the state in which they are or to establish simply a basis for future negotiations" including extradition declarations "and engagements for the prolongation of a treaty, before it expires." Foreign policy is the exclusive jurisdiction of the President of the Republic. Executive agreements would thus be concluded on matters which fall upon his power, which would be a matter of simple verification, due to the fact that the Federal Constitution indicates what is exclusively incumbent upon each branch of Government. In Brazil a custom would exist allowing the validity of executive agreements.<sup>16</sup>

In 1977, we wrote in our entry in the *Enciclopedia Saraiva de Direito* (in translation):

A meaningful example which constitutes an evidence of the need and of the usefulness of executive agreements, is given by the examination of what has been done in the field of the bilateral relations Brazil/F.R. of Germany, concerning the peaceful uses of nuclear energy. It is clear that there is an enormous complexity in installing in Brazil, in cooperation with Federal Germany, an entire nuclear industrial complex, which ranges from the extraction of minerals up to the activities related to the recycling of irradiated fuels (obtaining Plutonium, the fuel for breeder reactors), including the plants of fuel preparation, of reactor buildings and all associated legal problems, such as reciprocal duties, financing . . . the difficult questions of safeguards and the physical protection of nuclear devices held in common, all these, under International Atomic Energy Agency surveillance. Such complexity cannot be comprehended in a single treaty having only eleven articles, as that which was signed between both countries in Bonn, on June 27, 1975, "Agreement on the Peaceful Uses of Nuclear Energy"; this is a treaty in due form, because it was approved by the Brazilian Congress (Legislative Decree 85 of October 20, 1975) and was duly promulgated by the President (Decree 76.695 of December 2, 1975). This treaty was signed by Brazil's Minister of Foreign Affairs and by the F.R. of Ger-

16. *Id.* at 23-24.

many's Chancellor, then, the organs of the Executive Branch of Government which are responsible for the treaty-making process. . . . However, the following day, the Minister of Mines and Energy of Brazil would sign a "Protocol on Cooperation in the Field of Peaceful Uses of Nuclear Energy," also in Bonn, due to the fact that the Brazilian Minister of Mines and Energy had joined the official Brazilian delegation on the official visit to that country. In parallel, in Brazil, at the same day of both signatures, the Vice-Leader of the Government before the Brazilian Senate read and explained both agreements before the Senate, and the same would be repeated before the House of Representatives of Brazil. Nevertheless, later on, only the Agreement concluded between the Minister of Foreign Affairs and the F.R. of Germany Chancellor would be sent to the National Congress for referendum; the Protocol would not be sent and, by the way, the Members of the National Congress, who would be the immediately interested people in fighting for their own constitutional prerogatives, would not object to such an omission. This circumstance allows one to suppose that the National Congress had considered that the Protocol, being tied to the Agreement on the Peaceful Uses of Nuclear Energy, not only in its entry into force but also in its interpretation would dispense with the Legislative Power's referendum, because the principal legal document, the Agreement, had already been approved by the National Congress. Other illustrative examples in the same field are the executive agreement on the Approval of a Special Convention between the Nuclear Energy Nation Commission (CNEN) and the Jülich Center for Nuclear Research Ltd. (*Diário Oficial* June 1, 1973) concluded by an exchange of diplomatic notes, and the Agreement on the Approval of an Addendum to the same Jülich Agreement of October 3, 1973 (*Diário Oficial* of November 27, 1973); such commitments are consequences of the execution of the General Agreement in the Field of Scientific Research and Technological Development, of July 9, 1969, which was previously approved by the Statutory Decree 681 of July 15, 1969, and promulgated by the Decree 65.130 of September 15, 1969 (*Diário Oficial* of September 17, 1969). The executive agreement for the approval of the Convention between the CNEN (an autonomous federal entity) and the Jülich Center (a non-governmental German entity) was not sent to the National Congress, but it does appear in the National Congress Annals, because of a Senator's speech, who was a little deceived by the nonparticipation of the National Congress in such proceedings.

From an examination of these agreements one can conclude that there is an implied understanding between the executive and legislative branches of government. A specific agreement which completes a more general one can take the form of an executive agreement, but only if the more general one was previously approved by the National Congress. The National Congress had been silent in the CNEN/Jülich case and in the case of the Brazil/Germany nuclear agreement, as well as with respect to the Brazil/Israel Nuclear Agreement of 1966. The Brazil/Israel agreement had "entered into force at the date of its signature, due to the fact that it is a Supplementary Agreement to the

Basic Agreement on Technical Cooperation between Brazil and Israel, promulgated in 1964, after the National Congress's referendum."<sup>17</sup>

Professor Rezek<sup>18</sup> has noted that the classification of treaties based on their need for congressional approval is a subjective concept related to the internal constitutional rules of each party. For example, the Brazil/USA Military Agreement of March 15, 1952 was an executive agreement on the American side, but required congressional approval on the Brazilian side prior to its ratification. Article XII of that agreement specifies that the agreement enters into force at the moment the Brazilian government should have notified the U.S. government about the Brazilian ratification.<sup>19</sup>

All of this leads to one clear conclusion: legally binding executive agreements exist without congressional approval. Whether one believes that these agreements are binding because of constitutional custom (despite the fact that Brazilian scholars do not admit the existence of *extra legem* custom in constitutional matters) or because of the exclusive policy making power of the President in matters of foreign affairs, one cannot conclude that they are unconstitutional without also concluding that all foreign relations acts of the President have been unconstitutional since the beginning of independent life of the country! Furthermore, until recently the legislative branch of government has not taken any direct action against the President for his failure to send international agreements to Congress for approval, and a proceeding for impeachment could be considered in such circumstances. Nor has there been a direct judicial decision nullifying a treaty on the grounds that it lacked the constitutional prerequisites for entering into force.

The Federal Supreme Court of Brazil has issued binding precedent about the extent of congressional control of executive agreements under the Constitution and these decisions must be followed by inferior tribunals and judges in future cases. These decisions have dealt with the collateral subject of the relationship between international treaties in force in Brazil and internal prior or supervening domestic federal statutes. Nevertheless, they can indirectly guide interpreters of the treaty-making process under the Brazilian Federal Constitution. The Federal Supreme Court examined the question of the compatibility between the 1931 Geneva Convention on Uniform Law of Checks and two Brazilian statutes, Public Law 2044 of 1908 and Public Law 2951 of 1912 in the *Certiorari*

17. At p. 272.

18. REZEK, *supra* note 7, at 333.

19. *Id.*

RE 71.154 of 1971 (RTJ 58/70). The court decided that congressional approval of a treaty was sufficient to transform it into a domestic statute, without need of a special statute of approval or incorporation. The court also decided that definitive approval of a treaty by the National Congress revokes contradictory internal domestic statutes, and that the treaty supersedes any previous rule of law. In another certiorari RE 80.004 of 1977 (RTJ 83/809), the court examined the compatibility of the 1930 Geneva Convention of Uniform Law of Bill of Exchanges and Promissory Notes and the subsequent Brazilian statute, Statutory Decree 426 of January 1, 1969. The court decided that an international treaty can be superseded only by an internal federal statute because a treaty and a statute are on the same hierarchical level, and both can be superseded by the Federal Constitution. In a concurring opinion, Justice Leitão de Abreu stated that this is not the case for the application of the *lex posterior revogat priori* rule, but he added,

... a posterior statute in such a case, does not revoke the treaty, in the technical sense, but it suspends its application. The difference rests on the fact that, if a statute had revoked the treaty, this treaty should not be applied again, in that part which was revoked. But, in my mind, as the statute does not revoke the treaty, but while in force, it simply suspends the treaty dispositions which are incompatible with it, the treaty shall be applied again, if the statute which had hindered the application of the treaty dispositions, is revoked in its turn.<sup>20</sup>

## VI. UNDERSTANDINGS AND DECLARATIONS ATTACHED TO TREATIES

No rule in Brazilian constitutional law requires that a treaty must be approved as a whole. According to Professor Rezek, if a treaty allows the presentation of reservations, or if it does not prohibit them,

the National Congress has the power to approve it with restrictions - which the Government, at the moment of its ratification, will transmit as reservations - as well as the power to approve it with declarations concerning the disapproval of reservations made to it at the moment of its signature - and which may be confirmed at its ratification<sup>21</sup>

In his study<sup>22</sup> Professor Antonio Paulo Cachapuz de Medeiros notes the possible results of congressional examination of international treaties:

20. RTJ 83/836.

21. JOSÉ FRANCISCO REZEK, DIREITO INTERNACIONAL PUBLICO - CURSO ELEMENTAR 73 (1989).

22. ANTONIO PAULO CACHAPUZ DE MEDEIROS, O PODER LEGISLATIVO E OS TRATADOS INTERNACIONAIS (1983).

a) their rejection; b) their partial approval; c) their approval with amendments.

Congressional rejection of an international treaty is a rare phenomenon in Brazil. One example is the rejection of the ILO Convention 90 on industry night work of minors, adopted at the San Francisco Session of the International Labor Organization General Conference of 1948. The House of Representatives voted to reject the Convention on the grounds that there was a conflict between the Convention and the Brazilian Consolidation of Labor Laws, which forbids night work for children under 18 years of age. Thus, the National Congress voted to reject the ILO Convention (Legislative Decree 20 of April 30, 1965).

Professor Cachapuz de Medeiros's examples of partially approved treaties show exclusions from lists of items contained in the treaty. Examples of exclusions are ILO Conventions 103 and 106 (exclusion of certain categories of workers not allowed to have the special protection afforded by such Conventions) and the GATT negotiations for the establishment of a new III List (suppression of a series of Brazilian products).

The National Congress partially approved three other international agreements, but the restrictions made by Congress were motivated by suggestions by the President himself. These agreements are the Convention for the Repression of Illicit Acts against the Safety of Civil Aviation (Legislative Decree 33 of June 15, 1972), the Convention on the Protection of Cultural and Natural World Patrimony (Legislative Decree 75 of June 30, 1977), and the Ibero-American Agreement on Social Security (Legislative Decree 130 of December 2, 1980).

The congressional approval of the Brazil-USA Agreement on Guarantee of Investments signed in Washington, DC on February 6, 1965 deserves some attention. The National Congress rejected parts of the text based solely on political grounds and on the initiative of members of Congress. Article VI, paragraph 3, in its official version states,

There shall be excluded from the negotiations and the arbitral procedures herein contemplated, matters which remain exclusively within the internal jurisdiction of a sovereign State. It is accordingly understood that claims arising out of the expropriation of property of private foreign investors do not present questions of Public International Law, unless and until the judicial process of the recipient country has been exhausted and there exists a denial of justice, as those terms are defined in Public International Law. The monetary amount of any claim submitted for negotiation or arbitration in accordance with the provisions of this Agreement shall not exceed the amount of compensation paid under guaranties issued in accordance with this agreement with respect to the investment involved in the claim.



Senator Afonso Arinos, then a famous Professor of Constitutional Law in Brazil, presented the following objections to article VI, par.3:<sup>23</sup>

1) its language is not precise and it is insufficient, when it deals with the basic point of denial of justice, as there is not in Public International Law a generally accepted form for defining such an expression. What exists is a direct conflict between two conceptions of this legal formulation, the one that prevails in the countries receiving capital (which maintains that the denial is verified when the State does not offer a secure judicial protection to foreigners) and the other that is predominant in the investor's countries (which maintains that despite the assurance of formal judicial protection, this can be put into operation in an unjust manner toward foreigners).

Paragraph 3 of article VI of the Agreement states the subjects which do not belong to International Law, but which fall under the internal jurisdiction of Brazil, and which may be brought before international arbitration in the case of denial of justice, but if Governments may consider a denial of justice to exist in cases of an unjust judicial decision, even if issued according to the internal law, then, it follows that a judicial decision issued by the tribunals of Brazil, according to the Brazilian law, might be ex post facto submitted to an international jurisdiction, which is repulsive to our constitutional organization.

2) The Senate, following the constitutional commandment cannot vote for a treaty which may be expressly or implicitly, but in whatever hypothesis, undoubtedly unconstitutional. And the hypothesis, of having access to arbitration on claims which do not constitute points of International Law, would make vulnerable many articles of the Federal Constitution.

Finally, after a public hearing with the Minister of Foreign Affairs, the Agreement was approved with the following proviso:

DENIAL OF JUSTICE according to article VI, paragraph 3, must be understood as the inexistence of tribunals or of normal means of access to the Judiciary; the refusal to adjudicate by the authority having jurisdiction to; the unjustifiable delay of any judicial decision, following a violation of an internal procedural rule.

This proviso can be deemed a true congressional interpretation of the Brazil/USA Agreement of Investment Guarantee. Since it makes no sense to define "denial of justice" internally, the effects must be produced on international fora or in international negotiations. Therefore, the congressional proviso affects the international reciprocal relationship between Brazil and the USA in terms of protection of foreign investments.

## VII. CONGRESSIONAL AMENDMENTS TO INTERNATIONAL TREATIES

The third way the National Congress affects international treaties is

23. *Id.* at 152.

by approval of treaties with amendments, where the amendments are proposed by the National Congress itself. Relevant precedent in Brazilian law is the case of the Brazil/Czechoslovakia Agreement on Trade and Payments of June 24, 1960. When the National Congress reviewed this agreement, some members opposed the establishment of a Mixed Commission which would have the power to review annually a list of items annexed to the agreement. There was also opposition to the existence of the list itself. Consequently, the National Congress issued its approval under the condition that the following article be included: "Alterations in the list of items concerning Brazilian products . . . always including Brazilian basic materials which are relevant to the development of the national economy, shall be valid only after their approval by the National Congress, in the form required by the Constitution of the Republic of Brazil." The same Legislative Decree included an order to suppress "minerals of manganese" from the list of items to be exchanged. Professor H. Valladão, then the Legal Advisor of the Ministry of Foreign Affairs of Brazil, delivered a legal opinion.

. . . there is nothing in the Federal Constitution which prevents the National Congress . . . to amend a treaty or a convention . . . such amendments represent reservations which may be brought to the knowledge of the other Contracting Party, at the moment of the ratification . . . and, if they are accepted, they will become part of the treaty, definitely, and they will enter into force without the need of a new examination by the Legislative Branch of Government of Brazil.

The Czechoslovakian government was then consulted about the modifications in the agreement and finally gave its approval in an exchange of diplomatic notes in Prague on September 18, 1962. Subsequently, the President of Brazil promulgated the agreement on April 26, 1961 by Decree 51.951. The decree expressly mentioned the attachment of conditions introduced by the National Congress. This is a good illustration of the Brazilian Congress's practice of attaching amendments and provisos to international treaties. The other contracting party must agree to the modifications, and the modifications must be compatible with the treaty.

In the area of foreign relations the National Congress may not force the President to perform acts which are constitutionally reserved to the President's exclusive power and jurisdiction. Most believe that if the National Congress disagrees with a certain treaty in force, it has but one way to act against it: by passing a statute against the treaty's legal dispositions. Because of the Federal Supreme Court's doctrine a later federal statute supersedes a treaty internally. But there is no direct way for Con-

gress to force the President to denounce a treaty because denouncement and negotiation of international treaties are deemed as unilateral presidential acts not subject to congressional control.

Nevertheless, the President's power to terminate treaties which had been approved by Congress was raised once in Brazilian practice in the case of Brazil's withdrawal from the League of Nations and its subsequent denouncement of the 1919 Versailles Treaty. Following is the legal opinion of Clovis Bevilacqua, a famous Brazilian scholar and former Legal Counselor of the Ministry of Foreign Affairs:

if there is in the treaty a clause providing for and regulating its denouncement, when the Congress approves the treaty, it approves the way of how to terminate it: then, when such clause is put into practice, the Executive Power but exercises a right that is already declared in the text which has been approved by the Congress. The act of denouncement belongs to the Administration. The denouncement of a treaty is a way of enforcing it, when in one of its clauses the right to terminate it is clearly defined.<sup>24</sup>

Professor Rezek disagrees with Bevilacqua's opinion and states that the National Congress has an indirect power to force the President to terminate the treaty by passing a statute. For example, Public Law 2.416 of June 28, 1911 modified the method for extradition in Brazilian law and ordered the President to denounce existing bilateral treaties on extradition.<sup>25</sup>

Thus, in Brazil, when the President is under the mandate of a federal statute, he must denounce a treaty. However, where Congress attempts to force the President to denounce a treaty for political reasons Congress may not force the President to perform an act that is considered to be within his exclusive power and jurisdiction.

### VIII. CONCLUSIONS

The Brazilian system of treaty-making reflects the same complexities as the U.S. system.<sup>26</sup> In Brazil one can also say that the President is entrusted to a "royal power" to enter into international treaties. However, it must be recognized that the President of Brazil has not abused such "royal power."

Judicial review of the constitutionality of international treaties can act as a check against the risk of abuse. The constitutionality of interna-

24. CLÓVIS BEVILAQUA, *PARACERES* II 343 (Rio de Janeiro 1926).

25. REZEK, *supra* note 7, at 503.

26. See Louis Henkin, *Foreign Affairs and the Constitution*, 66 *FOREIGN AFFAIRS* 284 (1987/1988).

tional treaties can be decided either by a single judge on a federal court or via the certiorari, which is decided either by the Superior Court of Justice<sup>27</sup> or by the Federal Supreme Court.<sup>28</sup>

27. C.F. Art. 105, III(a), "when the appealed decision is contrary to the treaty or federal law or denies the effectiveness thereof."

28. C.F. Art. 102, III(b), "when the appealed decision declares the unconstitutionality of a treaty or a federal law."

